

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

JANUARY TERM, 1934

No. 6172

512

LILLIAN O. SELBY, APPELLANT,

vs.

S. KANN SONS CO.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED FEBRUARY 28, 1934.

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Court of Appeals of the District of Columbia

JANUARY TERM, 1934

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LILLIAN O. SELBY, APPELLANT,

vs.

S. KANN SONS CO., APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 6172.

LILLIAN O. SELBY, Appellant,

vs.

S. KANN SONS Co.

a Supreme Court of the District of Columbia.

At Law.

No. 78825.

LILLIAN O. SELBY, Plaintiff,

vs.

S. KANN SONS Co., Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1

Declaration.

Filed November 12, 1930.

In the Supreme Court of the District of Columbia.

At Law.

No. 78825.

LILLIAN O. SELBY, Plaintiff,

vs.

S. KANN SONS Co., Defendant.

The Plaintiff, Lillian O. Selby, by her attorney, Charles M. Johnston, sues the defendant, S. Kann Sons Co., a cor-

poration, having an office, divers agents and conducting business in the District of Columbia for that; heretofore to wit, on the 17th day of December 1929, in the District of Columbia the said defendant by and through its agents, servants, officers and employees was and still is operating and conducting a certain department store, to wit, S. Kann Sons Co., at 8th and Market Square, N. W., Washington, D. C. The plaintiff, heretofore to wit, on the day and place aforesaid entered the said store of the defendant for the purpose of purchasing certain goods, wares and merchandise sold by the defendant therein and for that plaintiff then and there became and was an invitee or business visitor of the said defendant; and for that it then and there became and was and continued to be the duty of the defendant and its agents, officers and employees to provide, maintain and keep in a useable and safe condition, certain passageways in the said store for the use of plaintiff, and to maintain and keep in good repair certain rugs, carpets and runners for the covering of said passageways and to maintain and provide inspection of said rugs, carpets and runners, so as to keep same in a useable and safe condition,

detect and repair defects therein, and maintain same
2 in a state of safety and utility for invitees and business visitors of said store and said plaintiff; but notwithstanding said duties in the premises, but carelessly neglecting and ignoring the same, defendant carelessly and negligently failed to provide, maintain and keep aforesaid rugs, carpets and runners in aforesaid passageways in a useable and safe condition, but permitted and allowed same to become unuseable and unsafe and especially with reference to the carpet, rug or runner, provided for covering the floor in the passageways of that part of the store designated as the shoe department which is located on the fourth floor of said store; and either carelessly and negligently failed to inspect the same or failed to make proper repairs if said proper inspection was made; when said inspection would have disclosed, if it had been made, defects which should be remedied by repair, said defects consisting in a tear, rip or hole in said carpet, rug or runner, or in a portion of said carpet, rug or runner, being not securely fastened to said floor of said passageway, so that plaintiff using due care and relying upon defendant's having assumed and properly carried out its duties aforesaid, attempted to rise from a

seat in said shoe department, in order to inspect some shoes on a rack, counter or shelf in said shoe department, whereupon by reason of said rip, tear, hole or failure to properly secure said carpet, rug or runner, to the floor of said passageway, the plaintiff without any neglect or negligence on her part whatsoever, her heel having caught in said rip, tear, hole or portion of said carpet, rug or runner not securely fastened to the floor of said passageway, was thrown violently forward over a stool or seat used by clerks in said shoe department, grievously hurting her knees and sustaining a shock to her nervous system and was thereby rendered sick, sore, lame and disordered and since the date of the injuries the plaintiff has not and will not recover

3 from the effects thereof, in that she is and will continue to be unable to walk or otherwise move about without pain and suffering to the said knees and the nerves in the left side of her face continue to twitch causing the plaintiff great pain, suffering and mental anguish, and the plaintiff is and will continue to be permanently injured by reason of the aforesaid injuries, all to the great damage of the plaintiff.

Wherefore, she brings her suit and claims Five Thousand (\$5,000.00) Dollars, besides costs.

CHARLES M. JOHNSTON,
Attorney for Plaintiff.

Plea.

Filed January 15, 1931.

* * * * *

Now comes the defendant, S. Kann Sons Co., a corporation, and for plea to the declaration filed herein, admits that on December 17th, 1929, it was conducting a certain department store at 8th & Market Square, Northwest, Washington, D. C., and admits that on said date said plaintiff was a customer in said store, and while there, as aforesaid, did fall, but defendant denies that it failed and neglected to keep the passageways in said store in a reasonably safe condition, and denies that the rugs, carpets, and runners covering said passageways and floors were in an unsafe and unusable condition, and denies that there were any defects in said rugs, carpets or runners which

would have caused said plaintiff to fall, and defendant denies each and every other allegation of said declaration, except those allegations relating to plaintiff's alleged injury and loss, concerning which defendant has not sufficient information or knowledge and is, therefore, unable either
4 to admit or deny same.

And for a second and further plea to said declaration, defendant says that plaintiff's alleged injuries and losses, if any, were the sole result of plaintiff's own negligence and carelessness in failing to use due and reasonable care for her own safety, in that said plaintiff did then and there negligently and carelessly stumble and fall over a certain stool or seat used by clerks in the shoe department of said department store, the presence of said stool or seat being obvious and readily discernible had plaintiff used due and reasonable care for her own safety.

CHAS. B. TEBBS,
FRANK H. MYERS,
Attorneys for Defendant.

Supreme Court of the District of Columbia.

Thursday, October 26, 1933.

Session resumed pursuant to adjournment, Hon. Chief Justice Alfred A. Wheat, presiding.

* * * * *

Come again the parties hereto in manner as aforesaid and the same jury that was respited yesterday and after this is further heard and given to the jury in charge they upon their oath say they find for the defendant, by the direction of the Court.

Whereupon, the time within which to file the motion for a new trial is hereby waived and judgment on this verdict is ordered. Wherefore, it is considered that plaintiff take nothing by this action that defendant go hence without day, be for nothing held and recover of plaintiff its costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the plaintiff by her attorneys of record, in open Court, notes an appeal
5 to the Court of Appeals of this District; whereupon, an undertaking to act as a cost bond is hereby fixed

in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

Memoranda.

November 15, 1933.—Undertaking on Appeal approved and filed. Proposed Bill of Exceptions and Notice filed.

Supreme Court of the District of Columbia.

Thursday, January 4, 1934.

Session resumed pursuant to adjournment, Hon. Chief Justice Alfred A. Wheat, presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record, and thereupon, the plaintiff submits to the Court her Bill of Exceptions taken at the trial of this cause and prays that the same be signed and made of record, *nunc pro tunc*, which is hereby accordingly done.

Assignment of Error.

Filed January 22, 1934.

* * * * *

The Court erred:

1. In directing the jury to render a verdict in favor of the defendant.

FRED B. RHODES,
COOPER B. RHODES,

Attorneys for Plaintiff, Appellant.

6 Service of a copy of the foregoing Assignment of Error is acknowledged this 22 day of January, 1934.

FROST, MYERS & TOWERS,
EY.,

Attorneys for Defendant, Appellee.

Designation of Record.

Filed January 22, 1934.

* * * * *

Now comes Lillian O. Selby, the appellant in the above-entitled cause and designates the parts of the record which

she desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Declaration.
2. Plea.
3. Assignment of Error.
4. Bill of Exceptions.
5. This Designation.

FRED B. RHODES,
COOPER B. RHODES,
Attorneys for Plaintiff.

Service of a copy of the foregoing Designation of Record is acknowledged this 22 day of January, 1934.

FROST, MYERS & TOWERS,
EY.,
Attorneys for Defendant.

7 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 6, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 78825 at Law, wherein Lillian O. Selby is Plaintiff and S. Kann Sons Co. is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 7th day of February, 1934.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk,
By ALF. G. BURNHAM,
Assistant Clerk.

8 In the Supreme Court of the District of Columbia.

Law. No. 78825.

LILLIAN O. SELBY, Plaintiff,

VS.

S. KANN SONS COMPANY, Defendant.

Bill of Exceptions.

Be it remembered that at the trial of this case before Mr. Chief Justice Wheat and a jury, duly impaneled and sworn to try the issues herein, which trial began on October 25th, 1933, and thereafter was further proceeded with, Mrs. Lillian O. Selby, plaintiff herein, being first duly sworn, testified on her own behalf, on direct examination in substance, as follows:

That she resided at 515 Savannah Street, S. E. Congress Heights, D. C., and had resided at that address for approximately twenty-two years; that she had been a customer of the defendant's department store for approximately thirty (30) years; that on December 17th, 1929, she went to the store and visited the shoe department of the store for the purpose of buying a pair of shoes; that the saleslady who waited upon her was a Mrs. Childers whom witness had known for some time and who had previously waited on her in that department; that Mrs. Childers showed her a pair of shoes which were not the kind which witness wanted; that witness rose from the chair in which she had been sitting to go back to the shelves to show Mrs. Childers the kind of shoes which witness wanted; that something caught her heel and threw her forward and when she got up and looked down she saw that there was a small rip in the binder rug facing her; that when she fell her knees struck a certain fitting stool; that she showed Mrs. Childers the place where the binder was ripped; that Mrs. Childers called the floorwalker and informed him that witness had fallen and tripped over, and showed him the place in the binder; that the floorwalker offered to send witness home in a taxicab, but witness stated that she did not feel that she was hurt enough to go home in a taxicab. Witness explained, by indicating and demonstrating, the nature of the rip or tear

in the binder of the rug and the manner in which her heel had caught in it and thrown her forward, and stated that she had not seen it until after her fall. Asked by her counsel if the rip in the binder was clearly discernable, witness answered "yes, you could see it very plainly". Witness further testified that when she got home on that day, her knees started to ache severely; that she walked to the office of her doctor which was about a block and a half from her home and that he gave her a remedy to use; that her stocking was torn and both of her knees were skinned; that the right knee was hurt more than the other; that her knees were swollen and remained swollen for three or four weeks; that her doctor, Dr. Meloy, treated her for quite a while, but witness did not remember for just how long; that she called Mrs. Childers the next day on the telephone to order some rubbers and Mrs. Childers asked her how she felt and witness told Mrs. Childers that she felt terrible; that Mrs. Childers told witness that she (Mrs. Childers) had reported it to the office; that subsequently a doctor retained by the defendant, a Dr. Prosperi, examined her, this examination taking place about seventeen (17) days after the accident; that Dr. Prosperi had witness call at his office to have an x-ray taken; that on the 24th of May, 1930, witness visited Dr. White who examined her knees and advised her to have an x-ray taken; that an x-ray was taken by Dr. Bierman who gave witness the x-ray plates. Witness identified plaintiff's exhibits 1 and 2 as the x-ray plates which were given to her by Dr. Bierman. Witness further testified that prior to this accident she had done all of her house work, except washing, and two years previous to the accident had worked in the lunchroom which had previously been operated by herself and her husband; that the accident had impaired her nervous system and caused a twitching of her face. On cross examination, witness described, by diagram, demonstration and explanation, the portion of the store in which she was injured, including the location of the shoes, shelves, the row of chairs in which she had been seated, and the carpet or runner which was in front of the row of chairs in which she had been seated, and testified that the shelves to which she was walking at the time of her injury were located in back of the row of chairs in which she had been seated. Witness was unable to recall the width of the binder and could not remember whether

any part of the chair in which she had been seated was on the carpet, and could not recall the relation of her feet and the carpet while she was seated in the chair and could not recall how many steps she had taken after arising and before she fell; that when witness fell, her knees hit one of the stools used by the employees of the department in fitting shoes; that her knees did not strike the floor; that there was no one present at the time except Mrs. Childers and herself; that the carpet was not torn, but that the stitches fastening the binder to the end of the carpet had become ripped. Witness again demonstrated the nature of the rip and indicated its length. Witness testified that the binder had become raised a little from the level of the floor. Witness testified that at the time of the accident, Mrs. Childers told her that she had not seen witness fall; that she did not go back to the defendant's store for two or three months after the accident; that the carpet has been changed but that she did not notice whether it had been changed when she first went back to the store three or four months after the accident and at that time did not look to see what had happened to the slit in the runner. She "never thought any more about looking for it"; her knees were still swollen at the time; she did not remember the appearance of the carpet, but thought it was dark; that the defect she saw after falling was a rip, not a tear—"there was no torn place there; just the stiches were ripped." The rip "was just at the end where the carpet ended". Witness had first had an attorney named Charles Macklin Johnston and had told him all the facts just as she told them in testifying; she did not tell her attorney there was a hole in the carpet because there was not a hole, nor did she tell him that she stumbled over the carpet because it was not fastened to the floor, and witness could not explain why her attorney had put allegations in the declaration that she had fallen over a hole or alternatively because the carpet was not securely fastened to the floor. Witness had been advised to have her teeth extracted and had had thirteen taken out, but did not have the nerve to go back and have the rest out. The accident complained of in the suit occurred in 1929 and it was long before that that her thirteen teeth were extracted. In the last five or six years witness had been advised to have her remaining teeth out. When she would have severe headaches her physician would say, "that is your teeth; have them out".

Further to maintain the issues on her part joined, plaintiff called as a witness, **Dr. Charles Stanley White**, who testified on direct examination in substance as follows:

11 That he was, and had for many years been, a practicing physician with offices in the District of Columbia; that in May, 1930, he examined the plaintiff's knees; that his examination disclosed an inflammation, or arthritis, in the joints of both knees of the plaintiff; that he had an x-ray examination made and that that examination also disclosed arthritis in the joints of both knees; that it was the opinion of witness, based upon his examination, diagnosis, and the history of the case as given to him, that an accident which the plaintiff had had three or four months previous to his examination was a contributing factor, but witness could not say that it was the entire factor in the case, and that in the opinion of the witness there was a definite relation between the accident and the arthritis, although he could not say to what extent; that witness again examined the plaintiff's knees in June, 1933, and at that time found no swelling of the knees and no evidence of violence on the outside, but that the arthritis was still present; that in the opinion of witness this condition will extend over a period of years, but witness could not state whether or not it is curable. Witness examined the x-ray plates identified as plaintiff's Exhibits numbered one (1) and two (2) and testified that the plates showed slight evidence of arthritis in the knee joint. On cross-examination witness stated that arthritis is infectious in origin, that is, is caused by a definite germ; that the original cause of plaintiff's arthritis was unknown to witness, but he believed the injury was a contributing cause; that it is a well known fact in the medical profession that bad teeth are a cause of arthritis; that witness did not examine plaintiff's teeth and did not look to them as a possible source of infection in plaintiff causing her condition of arthritis. The doctor witness found no evidence of an injury to plaintiff outside of the history given him, and it was possible that the condition of arthritis he found in the knee could have resulted from infected teeth without any injury interposing whatever.

Further to maintain the issues on her part joined, plaintiff called as a witness, **Dr. Arthur N. Meloy**, who, having been first duly sworn, testified on direct examination, in

substance, as follows: That he resided at 3211 Fifth Street, S. E., which is about a block and three-quarters from the residence of the plaintiff; that witness had been a practicing physician in Washington for about twenty-eight (28) years; that he had been plaintiff's physician for
12 about twenty-five years (25); that up to December, 1929, the plaintiff's general physical condition was very good; that in December, 1929, he treated the plaintiff for injuries to her knees and found her knees to be swollen painfully, and that it appeared that she had met with an accident; that witness treated the plaintiff for a period of about three (3) weeks at plaintiff's house and later treated her a number of times, over a period of three (3) months, in his office. On cross examination, witness testified that plaintiff was suffering from arthritis, and that arthritis follows an injury to the joint. On cross examination witness stated he had never examined plaintiff's teeth or nervous condition; that he examined plaintiff in December 1929 and found a condition of arthritis; that one of the main or principal causes of arthritis is infection of the joint, such as bad teeth, infections from pus accumulations, etc.; that a very common cause of arthritis is infected teeth.

Further to maintain the issues on her part joined, plaintiff called as a witness in her behalf, **Charles H. Selby**, who being first duly sworn, testified in substance, as follows: That he was the husband of the plaintiff, and that he and the plaintiff had been married about thirty-three (33) years; that prior to December 17, 1929, the general condition of his wife's health was good, and that in addition to her household duties the plaintiff had worked with him in a lunchroom for approximately seven (7) years; that on December 17, 1929, he arrived at home at about five o'clock in the afternoon, and at that time examined his wife's knees which had been injured; that both knees were skinned and were badly swollen; that the swollen condition lasted until the following May or longer; that during that time the plaintiff was not able to do all of her house work, and that it has been necessary for her to have the help of a servant in the house since the date of the accident.

Further to maintain the issues on her part joined, plaintiff called as a witness on her behalf, **Mrs. Minnie N. Nalley**, who, being first duly sworn, testified, in substance as fol-

lows: That she lived across the street from the plaintiff, and has known the plaintiff for about fifteen (15) years; that prior to December 17, 1929, the plaintiff's physical condition was very good and witness saw the plaintiff frequently;

13 that subsequent to December 17, 1929, the plaintiff has not been able to perform her house work as she had previously done and her physical condition has not been so good since that date.

Thereupon the plaintiff rested, and counsel for the defendant moved the court to direct a verdict in favor of the defendant on the grounds that no actionable negligence had been established by the plaintiff's testimony, and upon the further ground that no evidence had been presented to charge the defendant with notice with respect to the condition of the carpet and binder, and that there had been a fatal variance between the declaration and the testimony. After argument by counsel for both parties, the court expressed itself to be of the opinion that a verdict must be directed in favor of the defendant because the plaintiff had failed to offer evidence tending to show that the defendant had notice of the defective condition of the carpet or binder, prior to the time of the accident, or that such defective condition had existed for such a length of time that the defendant should have known of it. Whereupon the court granted the defendant's motion to direct a verdict in its favor, to which ruling of the court, the plaintiff duly reserved and was allowed an exception. Whereupon, in accordance with its ruling the court directed the jury to render a verdict in favor of the defendant.

The foregoing is the substance of all the testimony bearing upon the exceptions herein reserved on behalf of the plaintiff.

And thereupon, and as all of said exceptions were duly noted and allowed as aforesaid and duly entered upon the minutes of the court, and because the matters and things hereinbefore recited are not matters of record, in order to make same a part of the record herein, which is hereby ordered, so that the plaintiff may have her case reviewed on appeal, the plaintiff, by her attorneys, moves the court to sign and seal this, her bill of exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed, which motion is granted by the court; and thereupon the plaintiff tenders

this, her bill of exceptions, and requests the court to sign and seal the same, which is accordingly done, now for then, this 4th day of January 1934.

[SEAL.]

ALFRED A. WHEAT,
Chief Justice.

Approved:

FROST, MYERS & TOWERS,
Attorneys for Defendant.

Endorsed on cover: District of Columbia Supreme Court. No. 6172. Lillian O. Selby, Appellant, vs. S. Kann Sons Co. Court of Appeals, District of Columbia. Filed Feb. 28, 1934. Henry W. Hodges, Clerk.

(4775-C)

MAY 16 1934

Henry W. Hodges

CLERK

IN THE
Court of Appeals of the District of Columbia

January Term, 1934

No. 6172

LILLIAN O. SELBY,

Appellant,

vs.

S. KANN SONS CO.,

Appellee.

BRIEF FOR APPELLANT

FRED B. RHODES,

COOPER B. RHODES,

Attorneys for Appellant.

IN THE
Court of Appeals of the District of Columbia

January Term, 1934
No. 6172

LILLIAN O. SELBY,
Appellant,
vs.
S. KANN SONS CO.,
Appellee.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

In this brief the appellant will be designated as the plaintiff and the appellee as the defendant to conform to the alignment of the parties in the lower court.

Plaintiff brought her suit in the court below to recover damages arising out of injuries sustained by her while she was in the department store belonging to the defendant, as a customer. In the trial of the case, at the close of the testimony offered by the plaintiff, the Court, granting a motion made by defendant's counsel, directed the jury to return a verdict for the defendant. This appeal is from the judgment entered on that verdict.

The substance of the testimony which was offered on behalf of the plaintiff, aside from that which tended merely to show the nature and extent of her injuries, may be stated briefly, as follows:

Plaintiff visited the shoe department of the defendant's department store for the purpose of purchasing a pair of shoes. She took a seat in one of the chairs which were provided for the use of customers in that department, while the saleslady showed her certain shoes. The chair in which plaintiff sat was one of a row of such chairs, in front of which row of chairs was a long narrow carpet in the nature of a runner. On the end of that carpet there was fastened a strip of cloth which has been referred to as a binder, and the testimony showed that this binder had become loosened so that the edge of it was raised somewhat above the level of the carpet, instead of being fastened securely to the carpet as it should have been.

After plaintiff had been shown one or more pairs of shoes by the saleslady, plaintiff arose from the chair for the purpose of going to the shelves, which were behind the row of chairs, to point out to the saleslady the type of shoes plaintiff desired. To go around the row of chairs to get to the shelves, plaintiff walked on the carpet or runner toward the end at which the loosened binder strip was located. The heel of plaintiff's shoe was caught in the loosened portion of the binder, causing her to fall and sustain the injuries for which she seeks to recover in this action.

ASSIGNMENT OF ERROR

The Court erred in directing the jury to render a verdict in favor of the defendant.

ARGUMENT

Subsequent to the time of the trial of this case in the court below, the law applicable to this case has been definitely settled in this jurisdiction by the decision of this Court on November 6, 1933, in the case of **Hellyer vs. Sears, Roebuck & Company, 62 App. D. C. 318**. The questions involved in that case were precisely the same as those involved here.

As a customer in the defendant's store, plaintiff was an invitee and the defendant owed her the duty of keeping its premises, including the rug which caused her injuries, in a safe condition. As was stated by this Court in the *Hellyer* case, cited above, it was the duty of the defendant to inspect its premises from time to time to keep them safe.

The trial court ruled, at the close of the plaintiff's case, that it was necessary for the plaintiff to show that the defendant had notice of the defective condition of the carpet or binder prior to the time of the accident, or that such defective condition had existed for such a length of time that the defendant should have known of it (Record p. 12). In making that ruling, the trial justice applied the law as stated in the case of *F. W. Woolworth Company vs. Williams*, 59 App. D. C. 347, to the facts which appeared in this case. It is respectfully submitted that the facts

which appeared in the *Woolworth* case are essentially different from those which here appear and that, therefore, the same rule of law cannot be applied. The distinction to be noticed is that in the *Woolworth* case the condition which resulted in the plaintiff's injuries might have been caused by someone over whom the defendant had no control and for whose acts and omissions it was not liable. The cause of the injury complained of in the *Woolworth* case was a greasy substance on the floor of the defendant's store. As this Court said, in that case, "It may have been occasioned by some other customer, having no connection with the defendant, dropping or spilling something on the floor." In the present case, as in the *Hellyer* case, cited above, the cause of plaintiff's injury was a defect for which the defendant was directly responsible. Therefore, it was not necessary for the plaintiff to prove that the defendant had either actual or constructive notice of the defective condition.

In the case of **Washington Market Company vs. Clagett, 19 App. D. C. 12**, it appeared that the plaintiff slipped on a pile of fish, which had been allowed to fall in an aisle of the defendant's market fifteen minutes previously, and was injured. There was no evidence tending to show that the defendant had notice of this condition prior to the accident. In deciding that case, this Court said:

(P. 25) "It would seem to be clear that the invitation that was held out to the public to visit and deal at the market was of a nature to assure every one that he or she could go into the

market-house by the ordinary ways provided without incurring danger or risk to life or limb. It was the duty of the market company to guard against danger to their patrons, and if, by reason of the unsafe condition of the premises, an injury to a patron be sustained, without fault on his part, the onus is upon the market company to show that it could not, by the exercise of reasonable care by those for whose acts and omissions it was liable, have prevented the accident.

* * * * *

(P. 26) "The appellants contend, however, that it was incumbent upon the plaintiffs to show affirmatively that the defendant, the Washington Market Company, had actual notice of the existence of the obstruction in the aisle by the spilling of the fish and ice, before the accident occurred, to entitle the plaintiffs to recover against the company. But we think the question of actual notice to the parties representing the market company, in view of the facts of this case, is not material, and the right of the plaintiffs to recover does not depend upon the proof of such notice."

The Court of Appeals of Maryland, in the case of **Dickey vs. Hochchild, Kohn and Co., 146 Atl. 282**, decided May 24, 1929, discussed the case of *Schnatterer vs. Bamberger*, 81 N. J. Law 558, because the lower court had put much reliance upon that case in arriving at its decision; and the Court of Appeals of Maryland said:

"But we are unwilling to accept the reasoning of the court in that case or the conclusion

reached by the trial court in this. In that case the defendants must naturally have anticipated that the stairway would be used by a large number of people, and that as a result of such use the steps and any covering on them would become in time worn and defective, and as their duty to their patrons to see that the stairs were safe for use did not end when they constructed them, they were also bound to inspect the steps at reasonable intervals to ascertain their condition, and not to wait until some person whom they had invited to the store broke his neck as a result of a defect which a reasonable inspection would have revealed. And the defective condition which caused the accident was in itself some evidence of a failure to fairly discharge that duty."

* * * *

"The appellee should have anticipated that as a result of the wear and tear to which they would be subjected the material on the surface of the steps would at some time become worn and defective, and ordinary care required it to maintain some system of inspection which would discover that condition in time to remedy it before it resulted in injury to its customers. It is undoubtedly true that it was in no sense an insurer of the safety of its customers, but to exonerate it from any responsibility for the condition of the step which caused the accident unless it actually knew of the defect, or unless the plaintiff showed that it had existed for so long a period that defendant was charged with constructive notice of it, would be in effect to shift the duty of inspection from the storekeeper to the customer."

In view of the law as stated in the cases cited above, the judgment of the court below should be reversed, and a new trial granted.

Respectfully submitted,

FRED B. RHODES,
COOPER B. RHODES,
Attorneys for Appellant.

FILED SEP 10 1934

Henry H. Hodges

IN THE
**United States Court of Appeals
for the District of Columbia**

JANUARY TERM, 1934

No. 6172

LILLIAN O. SELBY, *Appellant,*

vs.

S. KANN SONS COMPANY, *Appellee.*

BRIEF FOR APPELLEE

NORMAN B. FROST,
FRANK H. MYERS,
FREDERIC N. TOWERS,
Attorneys for Appellee.

IN THE
**United States Court of Appeals
for the District of Columbia**

JANUARY TERM, 1934

No. 6172

LILLIAN O. SELBY, *Appellant*,

vs.

S. KANN SONS COMPANY, *Appellee*.

BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

Appellant here seeks to have set aside a judgment for defendant entered upon a verdict directed by the trial court at the close of plaintiff's case.

The sole question presented is whether at the close of plaintiff's case there was any evidence of negligence on the part of defendant requiring the case to be sent to the jury. The only witness on this point was plaintiff herself, who in substance testified as follows:

Plaintiff entered defendant's shoe department, was seated and given attendance by a sales lady. She arose from her chair to go back to where the sales lady was getting out some merchandise when "something caught her heel and threw her forward and

when she got up and looked down she saw that there was a small rip" between the carpet and its binder. (R. 7) She did not see the rip at all until after she fell. "The carpet was not torn, but the stitches fastening the binder to the end of the carpet had become ripped"; . . . "there was no torn place there; just the stitches were ripped". The rip "was just at the end where the carpet ended." (R. 9) There was no testimony that the rip existed prior to plaintiff's stumble, and no attempt whatever was made to establish notice on the part of the defendant, actual or constructive, of the prior existence of the rip. This lack of any showing of notice on the part of the defendant was deemed by the trial judge to be fatal to plaintiff's case.

THE PLEADINGS

The declaration, which contained a single count, alleged a failure on the part of defendant to keep its carpet in a safe condition, and, in the alternative, that it "either carelessly or negligently failed to inspect the same or failed to make proper repairs if said proper inspection was made, which said inspection would have disclosed, if it had been made, defects which should be remedied by repair, said defects consisting of a tear, rip, or hole in said carpet, rug or runner, or in a portion of said carpet, rug, or runner, or in a portion of said carpet, rug, or runner being not securely fastened" to the floor. Defendant by its plea denied specifically that there were any defects in its floor coverings, denied generally all the other allegations of the declaration, and further alleged that the plaintiff's injuries were caused by her having carelessly stumbled and fallen over a fitting stool or seat.

ASSIGNMENT OF ERROR

The sole assignment of error is the trial court's action in directing a verdict for the defendant at the close of plaintiff's case.

ARGUMENT

Appellant rests its case here upon the *per curiam* decision of this court in *Hellyer v. Sears, Roebuck & Co.*, 62 D. C. App. 318 (November 6, 1933). As appellee reads and construes that opinion, a very different case from the instant one was there presented. In the first place, the declaration in the Hellyer case alleged the duty and a breach thereof on the part of the defendant in seeing that the steps and stairway, the defective condition of which caused the injury, *were so constructed* as to be reasonably safe for use by the large number of persons who were to use the same, including plaintiff. In this type of negligence case the difference between an action founded upon *negligent construction* and *negligent maintenance* is all important so far as the rule regarding notice is concerned. The store building in the Hellyer case was newly constructed and had been open to the public only three days prior to the accident. Hence there was raised in that case the question of defendant's negligence in improperly constructing its stairway, whereas in this case the declaration is based solely upon negligent maintenance. That the appeal in the Hellyer case was based entirely upon the theory that the defect complained of was a structural one, is shown from the following quotations from appellant's brief:

“The main question here presented is whether or not the owner of a store, (who has a building constructed), is answerable in damages for a defective and unsafe condition of a structural na-

ture which exists three days after the completion of said building and stairway, which causes injuries to a customer, and whether or not it is necessary for the plaintiff to prove that said owner had either actual or constructive notice of such structural defect, before the owner is liable." * * *

"We agree with the Woolworth case and admit that where a dangerous condition exists, not of a structural nature, and not created by the proprietor, or his servants or agents, that before the proprietor can be held liable in damages, the plaintiff must prove that the defendant had either actual or constructive notice of the existence of the dangerous condition." * * *

"In the instant case the defective and dangerous condition of the step was created by the owner or his agents when the stairway was built and the structural defect in the step became apparent only three days after it was constructed and opened to the public.

"We, therefore contend that the Woolworth case does not apply, nor should it be considered as against the plaintiffs contention in this case."

Further, in the Hellyer case although there was no direct evidence that the defect had existed previously, from the nature of the accident, the fact that the building only three days previously had been thrown open to the public, and the conditions existing after the occurrence, it was a reasonable inference that it had; whereas, here it is just as reasonable to assume that the breaking of the stitches between the carpet and its binder was caused by the accident itself—plaintiff stumbling over the edge of the carpet—as it is that the break existed prior to plaintiff's fall. And when a plaintiff's evidence gives equal support to each of two inconsistent inferences, judgment, as a matter

of law, must go against the party having the burden of proof. *P. R. R. v. Chamberlain*, 288 U. S. 333, 53 Sup. Ct. Rep. 391.

This court did not, we take it, intend by its *per curiam* decision in the Hellyer case to overrule the doctrine of *Woolworth v. Williams*, 59 D. C. App. 347, and the cases in this jurisdiction preceding it* respecting the necessity of prior notice (including those in which the District of Columbia was defendant, growing out of defective street conditions) or else it would have very clearly said so. In the *Woolworth* case plaintiff had slipped on a foreign substance, oval shaped, dark, and slightly raised above the floor. She, like the appellant here gave the only testimony upon which defendant could be charged with negligence. The case was permitted to go to the jury, a judgment was entered against defendant, and an appeal taken to this Court from the refusal of the trial court to direct a verdict. This Court held that there was no theory upon which a judgment could be sustained, saying:

“The burden of proving defendant’s negligence is upon the plaintiff. The mere happening of the accident does not shift to the defendant the burden of establishing that the accident did not occur through its negligence, nor does it create a presumption of negligence. On the contrary, the legal presumption is that reasonable care was exercised by the defendant. In the case of *Schnatterer v. Bamberger, et al.*, 81 N. J. Law, 558, 79 A. 324, 325, 34 L. R. A. (N. S.) 1077, Ann. Cas. 1912D, 139, the plaintiff sued for injuries sustained from a fall in defendant’s store. The fall was caused by her tripping on a loosened brass

**District v. Payne*, 13 App. D. C. 500.

Scott v. District, 27 App. D. C. 413.

District v. Blackman, 32 App. D. C. 32.

Harrison v. Davis Const. Co., 42 App. D. C. 255.

edging or nosing originally fastened by screws to the upper edge of the step for the protection thereof. The court, affirming the judgment in nonsuit, among other things, said: 'When the plaintiff rested her case, it had not appeared that the defendant company had been guilty of any want of reasonable care in the keeping of its store safe for her use, for the reason that she had failed to show that the defective condition of the brass edging which she said existed on the night of the accident of April 24th had either (a) been in fact brought to the previous notice of the defendant, or, failing in proof of such actual notice, that (b) the defect had existed for such space of time before that occurrence as would have afforded the company sufficient opportunity to make proper inspection of its stairways to ascertain their condition as to safety, and to repair their defects. In the absence of proof of either, the legal *presumption* is that defendant had used reasonable care.'

"The defendant is not an insurer against accident to persons entering its store for the purpose of making purchases or otherwise. Until it is established that the accident was occasioned through the negligence of defendant's employees, or as the result of the existence of a condition of which defendant had either actual or constructive notice, there can be no recovery."

The Circuit Court of Appeals for the third circuit, in the case of *Kaufman Department Stores v. Cranton*, 258 Fed. 917 (cited with approval by this Court in the Woolworth case) had before it precisely the point of law at issue here, namely, whether it is incumbent upon a plaintiff in an action against a storekeeper to show that the defective condition of a rug or carpet set up as the basis of the action was known to the defendant, or was such that the defendant should have

anticipated that it would become dangerous unless repaired or replaced. That court held, in effect, that actual or constructive notice was essential, and in its opinion said—

“The proprietor of a store to which prospective customers are invited, like any other person who, expressly or impliedly, invites others upon his premises, is not an insurer of their safety while in the store, but owes to them merely the duty of exercising reasonable care to keep the store in a safe condition for their proper use. Toland v. Paine Furniture Co., 175 Mass. 476, 56 N. E. 608; Schnatterer v. Bamberger & Co., 81 N. J. Law, 558, 79 Atl. 324, 34 L. R. A. (N. S.) 1077, Ann. Cas. 1912D, 139; Albachten v. Golden Rule, 135 Minn. 381, 160 N. W. 1012; Chilberg v. Standard Furniture Co., 63 Wash. 414, 115 Pac. 837, 34 L. R. A. (N. S.) 1079. We are unable to interpret the decisions of the appellate courts of Pennsylvania, in Woodruff v. Painter & Eldredge, 150 Pa. 91, 24 Atl. 621, 16 L. R. A. 451, 30 Am. St. Rep. 786, Bloomer v. Snellenburg, 221 Pa. 25, 69 Atl. 1124, 21 L. R. A. (N. S.) 464; Polenske v. Lit Bros., 18 Pa. Super. Ct. 474, and Sidwell v. Gimbel Bros., 52 P. A. Super Ct. 286, as enunciating any different rule. As a consequence of that rule, it of course follows, in a case such as this, *where the defective condition was not a structural one*, as it was in some of the before-cited Pennsylvania cases, but was due to the carpet or rug becoming out of repair, that, before the defendant could be charged with a failure to perform its duty to Mrs. Cranston, it was necessary for the jury to find, either that the defendant had actual knowledge of the wornout or defective condition of the carpet a sufficient length of time before the accident happened to have enabled it to repair it, or to have warned Mrs. Cranston of its condition, or that its actual condition, at the time of the ac-

cident, had existed for such a length of time prior thereto that the defendant, in the exercise of reasonable care, should have discovered it before the accident and remedied it, or that its general condition before the accident was such that, in the exercise of reasonable care, the defendant must have anticipated that it would in all probability, unless repaired or replaced, become dangerous to customers or persons lawfully passing over it.” (Italics supplied.)

The opinion does not disclose what evidence there was of notice but obviously there was some, as it was agreed that the case was one for the jury. Here we have not a scintilla of direct testimony nor any basis whatever for presuming that (a) the condition of the broken stitches between the carpet and the binder existed prior to the plaintiff’s fall or (b) that the defendant had any knowledge or chance of knowing of the alleged defective condition. There is no word in the record regarding the general condition of the carpet, whether it was new or old—other than plaintiff’s testimony that “the carpet was not torn,” (R. 9)—or anything else from which it might be said that the defendant could have anticipated that it might become dangerous.

Where the condition complained of is a structural one, as in the *Kaufman* case, the courts have held that notice is unnecessary and appellee assumes that but for the charge made in the *Hellyer* case that the defendant was negligent in constructing its steps this court’s decision would have been different. Otherwise *Woolworth v. Williams* and the District of Columbia cases prior thereto would have been overruled and the Circuit Court of Appeals’ decision in the case of *Kaufman v. Cranston*, supra, previously approved, would

have been discarded. And these things this Court did not do and we suppose did not intend to do.

Appellant cites the case of *Washington Market Co. v. Clagett*, 19 D. C. App. 12 as an authority on the question of notice. In that case, however, the legal theory that a defendant must have either actual or constructive notice when a dangerous condition exists on its premises is asserted rather than denied. It was proven that the market company hired men to patrol the aisles of its market, which were frequently littered with foreign substances, for the purpose of keeping them in order. "But it would seem from the testimony that there was no inspection or patrol by these watchmen or any of them of the fish aisle where the accident occurred during the day after nine o'clock a. m." The principle was applied that "having the means of knowledge and negligently remaining ignorant is the equivalent, in construing a liability, to actual knowledge".

The only other case cited is *Dickey v. Hochschild, Kohn & Co.*, 146 Atl. 282. The facts in that case are similar to those in the Hellyer case in that the plaintiff got her foot caught in between a step and the metal stripping thereof which had become loose—

"In this case the accident was caused by the loose end of an iron strap being raised above the surface of the step. It appeared that the strap was designed to be fastened to the step by a screw, for the fast part was so fastened and there was a hole for the screw in the loose end, but there was no screw in it."

The court said that the "defective condition which caused the accident was in itself some evidence of a failure fairly to discharge the defendant's duty to

reasonably protect the stairway which it knew was used by a large number of persons.”

The decision in this case is at variance with *Schnatterer v. Bamberger*, et al., 81 N. J. Law 558, which was cited with approval by this Court in the Woolworth case.

But the facts in the instant case are such that one cannot legally infer that any defect existed prior to plaintiff's fall. In each the *Schnatterer* and *Dickey* cases the heel of a woman's shoe was taken off by becoming stuck in an interstice caused by the defect; but the foot of Mrs. Selby stumbling over appellee's carpet might easily have broken away some of the threads where the carpet was fastened to its binder. As a matter of fact there is nothing in the record to show that the slit between the carpet and the binder which plaintiff observed after she arose was of sufficient size to have caught a portion of her shoe so as to have been the cause of her fall.

THIS IS NOT A CASE WHERE THE DOCTRINE OF RES IPSA LOQUITUR CAN BE APPLIED

The sum-total of plaintiff's evidence is that she stumbled on a carpet in defendant's store and thereafter noticed that the threads between the carpet and its binder near where she fell were broken. The only way to make out a plaintiff's case on such testimony is to apply the doctrine of *res ipsa loquitur* and this cannot be done because the declaration sets up specific acts of negligence, *Moore v. Claggett*, 48 D. C. App. 410; and further because the subject matter of the accident itself does not justify application of the doctrine. *Sweeney v. Erving*, 228 U. S. 240: 50 L. Ed. 815, 818; 33 Sup. Ct. Rep. 416.

CONCLUSION

It is respectfully submitted that the action of the lower court in directing a verdict for the defendant in this case should be affirmed. If *Woolworth v. Williams*, *Kaufman v. Cranston*, and the prior cases upon which those decisions are based are still good law, there was no testimony whatsoever adduced by the plaintiff which would have justified the learned trial justice in submitting this case to the jury.

Respectfully submitted,

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